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COMMON CARRIER BUREAU SEEKS FURTHER COMMENT ON SPECIFIC QUESTIONS IN CPNI RULEMAKING

CC DOCKET No. 96-115

Comment Date: March 17, 1997
Reply Comment Date: March 27, 1997

On May 17, 1996, the Commission released a *Notice of Proposed Rulemaking* (NPRM) initiating a proceeding to implement the customer proprietary network information (CPNI) requirements of section 222 of the Telecommunications Act of 1996 (1996 Act).¹ The CPNI NPRM sought comment on, among other things: (1) the scope of the phrase "telecommunications service," as it is used in section 222; (2) when telecommunications carriers may use, disclose, or permit access to individually identifiable CPNI absent customer approval; and (3) the requirements for customer approval.

On December 24, 1996, the Commission released the *Non-Accounting Safeguards Order*, which adopted rules and policies governing the Bell Operating Companies' (BOCs') provision of certain services through section 272 affiliates.² In paragraph 222 of that Order, the Commission concluded that the nondiscrimination provisions of section 272(c)(1) govern the BOCs' use of CPNI and that BOCs must comply with the requirements of both section 222 and section 272(c)(1). Section 272(c)(1) requires that a BOC not discriminate between its section 272 affiliate and other entities in, among other things, the provision of services and information. In paragraph 222 of the *Non-Accounting Safeguards Order*, however, the

¹ *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd 12513 (1996) (CPNI NPRM).

² *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (rel. Dec. 24, 1996) (*Non-Accounting Safeguards Order*).

Commission deferred to the CPNI rulemaking proceeding issues concerning the interplay between section 222 and section 272(c)(1). In paragraph 300 of that Order, the Commission deferred to the CPNI proceeding issues that concern the interplay between the joint marketing restrictions of section 272(g) and section 222. The Commission emphasized, however, that if a BOC markets or sells the services of its section 272 affiliate pursuant to section 272(g), it must comply with the statutory requirements of section 222 and any rules promulgated thereunder.

On February 7, 1997, the Commission released the *Electronic Publishing Order*, which adopted policies and rules governing, among other things, BOC provision of electronic publishing under section 274.³ Section 274 permits BOCs to provide electronic publishing services only through a "separated affiliate" or "electronic publishing joint venture" that meets certain separation, nondiscrimination, and joint marketing requirements. In paragraph 142 of that Order, the Commission deferred to the CPNI proceeding any decision on the extent, if any, that section 222 affects implementation of the joint marketing provisions of section 274. In paragraph 169 of that Order, the Commission also deferred to this proceeding the following issues: (1) whether the term "basic telephone service information," as defined in section 274(i)(3), includes CPNI; (2) whether section 222 requires a BOC engaged in permissible marketing activities under section 274(c)(2) to obtain customer approval before using, disclosing, or permitting access to CPNI; and (3) whether or to what extent section 274(c)(2)(B) imposes any obligations on BOCs that use, disclose, or permit access to CPNI pursuant to a "teaming" or "business arrangement" under that section.

Comments and reply comments in the CPNI proceeding were received on June 11, 1996 and June 26, 1996, respectively. In view of the Commission's determinations in the *Non-Accounting Safeguards* and *Electronic Publishing Orders*, the Common Carrier Bureau (Bureau) seeks further comment to supplement the record in the CPNI proceeding on specific issues relating to the subjects previously noticed in this proceeding and their interplay with sections 272 and 274. Specifically, interested parties are invited to file comments and reply comments on the attached list of questions. Commenters should address these questions in the order in which they are presented and should restate and highlight each question above their responses. Commenters should identify specific statutory language or legislative history that supports their arguments and address the impact of their positions on customer privacy and competition. The comments should not exceed 40 pages; reply comments should not exceed 25 pages. Comments should be filed on or before March 17, 1997. Any reply comments should be filed on or before March 27, 1997.

Neither this public notice nor the attached questions resolve any of the issues in the CPNI rulemaking. To help focus the parties' responses, however, certain individual questions include assumptions as to how the Commission might resolve specific issues in the

³ *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, FCC 97-35 (rel. Feb. 7, 1997) (*Electronic Publishing Order*).

rulemaking. Commenters should not construe these assumptions or any other aspect of the questions as indicating how the Bureau might advise the Commission with regard to those issues or how the Commission might resolve them.

Interested parties must file an original and four copies of their comments and reply comments with the Office of the Secretary, Federal Communications Commission, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments should reference CC Docket No. 96-115. Parties should also send two copies of their comments and reply comments to Janice M. Myles of the Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, (202)418-1577, as well as one copy to the Commission's copy contractor, International Transcription Service, Room 140, 2100 M Street, N.W., Washington, D.C. 20037, at (202)857-3800. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice M. Myles of the Common Carrier Bureau and to International Transcription Service at the above addresses. Each such submission should be on a 3.5 inch diskette in an IBM compatible format using WordPerfect 5.1 for Windows software in a "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, and date of submission. The diskette should be accompanied by a cover letter.

For further information contact: Dorothy Ttyne Attwood, (202)418-1580.

6. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities? If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?

C. Other Issues

7. If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?

8. To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or section 272 affiliate to engage in those activities, please describe in detail the basis for that position.

9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services . . . concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any . . . services . . . or information concerning its provision of exchange access to [its affiliate] unless such . . . services . . . or information are made available to other providers of interLATA services in that market on the same terms and conditions"?

10. Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?

ATTACHMENT: QUESTIONS

I. Interplay Between Section 222 and Section 272

A. Using, Disclosing, and Permitting Access to CPNI

1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of . . . services . . . and information . . ." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

3. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2?

B. Customer Approval

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate? If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?

11. Please comment on any other issues relating to the interplay between sections 222 and 272.

12. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 272.

II. Interplay Between Section 222 and Section 274

A. Threshold Issues

13. To what extent, if any, does the term "basic telephone service information," as used in section 274(c)(2)(B) and defined in section 274(i)(3), include information that is classified as CPNI under section 222(f)(1)?

B. Using, Disclosing, and Permitting Access to CPNI

(i). Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

14. Does section 274(c)(2)(A) mean that a BOC that is providing "inbound telemarketing or referral services related to the provision of electronic publishing" to a separated affiliate, electronic publishing joint venture, or affiliate may use, disclose, or permit access to CPNI in connection with those services only if the CPNI is made available, on nondiscriminatory terms, to all unaffiliated electronic publishers who have requested such services? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(A) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

(ii). Section 274(c)(2)(B) -- Teaming or Business Arrangements

15. To the extent that basic telephone service information is also CPNI, should section 274(c)(2)(B) be construed to mean that a BOC, engaged in an electronic publishing "teaming" or "business arrangement" with "any separated affiliate or any other electronic publisher," may use, disclose, or permit access to basic telephone service information that is CPNI in connection with that teaming or business arrangement only if such CPNI is also made available on a nondiscriminatory basis to other teaming or business arrangements and unaffiliated electronic publishers? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(B) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

16. If section 222(c)(2) permits a BOC to disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request," does section 274(c)(2)(B) require that the entities, both affiliated and non-affiliated, engaged in section 274 teaming or

business arrangements with the BOC be treated as third parties for which the BOC must have a customer's affirmative written request before disclosing CPNI to such entities?

(iii). Section 274(c)(2)(C) -- Electronic Publishing Joint Ventures

17. Should section 274(c)(2)(C) be construed to mean that an electronic publishing joint venture be treated as a third party for which the BOC must have a customer's approval, whether oral, written, or opt-out, before disclosing CPNI to that joint venture or to joint venture partners?

C. Customer Approval

(i). Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

18. Must a BOC that is providing inbound telemarketing or referral services to a "separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher" under section 274(c)(2)(A) obtain customer approval pursuant to section 222(c) before using, disclosing, or permitting access to CPNI on behalf of such entities? If so, what forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation? What impact, if any, does section 222(d)(3) have on the forms of customer approval in connection with section 274(c)(2)(A) activities?

19. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its separated affiliate or electronic publishing joint venture also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers when it provides such a service for its section 274 separated affiliates, electronic publishing joint ventures, or affiliates under section 274(c)(2)(A)? What impact, if any, does section 222(d)(3) have on the BOC's obligations under section 274(c)(2)(A) with regard to the solicitation of a customer's approval during a customer-initiated call? What specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 274 separated affiliates or electronic publishing joint ventures or affiliates over unaffiliated entities? If the customer approves disclosure to both the BOC's section 274 separated affiliates or electronic publishing joint ventures or affiliates and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 274 separated affiliates or electronic publishing joint ventures or affiliates?

20. To the extent that sections 222(c)(1) and 222(d)(3) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated electronic publishers under the same standard for customer approval as is permitted in connection with its section 274 separated affiliate, electronic publishing joint venture, or affiliate under section 274(c)(2)(A)? If, for

example, a BOC may disclose CPNI to its section 274 separated affiliate pursuant to the customer's oral or opt-out approval, is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

(ii). Section 274(c)(2)(B) -- Teaming or Business Arrangements

21. Must a BOC, that is engaged in a teaming or business arrangement under section 274(c)(2)(B) with "any separated affiliate or with any other electronic publisher," obtain customer approval before using, disclosing, or permitting access to CPNI for such entities? What forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation?

22. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of any of its teaming or business arrangements under section 274(c)(2)(B) also offer to solicit that approval on behalf of other teaming arrangements and unaffiliated electronic publishers? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers and teaming arrangements when it provides such a service for any of its teaming or business arrangements under section 274(c)(2)(B)? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its electronic publishing teaming or business arrangements over unaffiliated entities? If the customer approves disclosure to both the BOC's electronic publishing teaming or business arrangements and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its electronic publishing teaming or business arrangements?

23. To the extent that sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated electronic publishers under the same standard for customer approval as is permitted in connection with its teaming or business arrangements under section 274(c)(2)(B)? If, for example, a BOC may disclose CPNI to a section 274 separated affiliate with which the BOC has a teaming arrangement pursuant the customer's oral or opt-out approval, is the BOC likewise required to disclose CPNI to unaffiliated electronic publishers or teaming arrangements upon obtaining approval from the customer pursuant to the same method?

D. Other Issues

24. Does the seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 274 separated affiliate or electronic publishing joint venture constitute a "transaction" under section 274(b)(3)? If so, what steps, if any, must the BOC and its section 274 separated affiliate or electronic publishing joint venture take to comply with the requirements of section 274(b)(3) for purposes of CPNI?

25. Please comment on any other issues relating to the interplay between sections 222 and 274.

26. Please propose any specific rules that the Commission should adopt to implement section 222 consistent with the provisions of section 274?